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12 **UNITED STATES DISTRICT COURT**

13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 **Patrick Cross, Individually and  
 15 on behalf of All Others Similarly  
 16 Situated,**

17 **Plaintiff,**

18 **v.**

19 **Infinity Energy, Inc.,**

20 **Defendant.**

21 **Case No.: '16CV2527 MMAJLB**

22 **CLASS ACTION**

23 **CLASS ACTION COMPLAINT  
 24 FOR DAMAGES AND  
 25 INJUNCTIVE RELIEF  
 26 PURSUANT TO THE  
 27 TELEPHONE CONSUMER  
 28 PROTECTION ACT, 47 U.S.C. §  
 29 227 ET SEQ.**

30 **Jury Trial Demanded**

31 **INTRODUCTION**

32 1. Patrick Cross (referred to individually as “Mr. Cross” or “Plaintiff”), brings  
 33 this class action for damages, injunctive relief, and any other available legal  
 34 or equitable remedies, resulting from the illegal actions of Infinity Energy,  
 35 Inc. (“IE” or “Defendant”), in negligently, knowingly, and/or willfully

1 contacting Plaintiff on Plaintiff's cellular telephone, in violation of the  
2 Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq., ("TCPA"),  
3 thereby invading Plaintiff's privacy. Plaintiff alleges as follows upon  
4 personal knowledge as to himself and his own acts and experiences, and, as to  
5 all other matters, upon information and belief, including investigation  
6 conducted by his attorneys.

7 2. The TCPA was designed to prevent calls like the ones described within this  
8 complaint, and to protect the privacy of citizens like Plaintiff. "Voluminous  
9 consumer complaints about abuses of telephone technology – for example,  
10 computerized calls dispatched to private homes – prompted Congress to pass  
11 the TCPA." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

12 3. In enacting the TCPA, Congress intended to give consumers a choice as to  
13 how creditors and telemarketers may call them, and made specific findings  
14 that "[t]echnologies that might allow consumers to avoid receiving such calls  
15 are not universally available, are costly, are unlikely to be enforced, or place  
16 an inordinate burden on the consumer." TCPA, Pub.L. No. 102-243, § 11.  
17 Toward this end, Congress found that:

18 Banning such automated or prerecorded telephone calls to the  
19 home, except when the receiving party consents to receiving the  
20 call or when such calls are necessary in an emergency situation  
21 affecting the health and safety of the consumer, is the only  
22 effective means of protecting telephone consumers from this  
nuisance and privacy invasion.

23 *Id.* at § 12; *see also, Martin v. Leading Edge Recovery Solutions, LLC*, 2012  
24 WL 3292838, at \*4 (N.D. Ill. Aug. 10, 2012) (citing Congressional finding  
25 on TCPA's purpose).

26 4. Congress also specifically found that "the evidence presented to the Congress  
27 indicates that automated or prerecorded calls are a nuisance and an invasion

1 of privacy, regardless of the type of call [...]." *Id.* At §§ 12-13. *See also,*  
 2 *Mims*, 132 S. Ct. at 744.

3 5. As Judge Easterbrook of the Seventh Circuit explained in a TCPA case  
 4 regarding calls to a non-debtor similar to this one:

5 The Telephone Consumer Protection Act [...] is well known for its  
 6 provisions limiting junk-fax transmissions. A less litigated part of  
 7 the Act curtails the use of automated dialers and prerecorded  
 8 messages to cell phones, whose subscribers often are billed by the  
 9 minute as soon as the call is answered – and routing a call to  
 10 voicemail counts as answering the call. An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.

11 *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7<sup>th</sup> Cir. 2012).

12 13 **JURISDICTION AND VENUE**

14 6. Jurisdiction is proper under 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs.*,  
 15 *LLC*, 132 S.Ct. 740 (2012), because Plaintiff alleges violations of federal law.  
 16 7. Venue is proper in the United States District Court for the Southern District of  
 17 California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because Plaintiff lives  
 18 in San Diego, CA, and the events giving rise to Plaintiff's causes of action  
 19 against Defendant occurred in the State of California within the Southern  
 20 District of California and Defendant conducts business in the area of San  
 21 Diego, California.

22 23 **PARTIES**

24 8. Plaintiff is, and at all times mentioned herein was, an individual citizen and  
 25 resident of the County of San Diego, in the State of California. Plaintiff owns  
 26 real property in the County and City of San Diego, which was the subject of  
 27 Defendant's automated call.



1 9. Plaintiff is informed and believes, and thereon alleges, that IE is, and at all  
2 times mentioned herein was, a company incorporated in the state of California  
3 and headquartered in Roseville, CA, and at all times mentioned herein was, a  
4 corporation and a “person,” as defined by 47 U.S.C. § 153 (39).  
5 10. Plaintiff is informed and believes, and thereon alleges, that at all relevant  
6 times, IE conducted business in the State of California and in the County of  
7 San Diego, and within this judicial district.

8

## 9 FACTUAL ALLEGATIONS

10 11. At all times relevant, Plaintiff was a citizen of the State of California.  
11 Plaintiff is, and at all times mentioned herein was, “persons” as defined by 47  
12 U.S.C § 153 (39).  
13 12. Defendant is, and at all times mentioned herein was, “persons” as defined by  
14 47 U.S.C. §153 (39).  
15 13. Sometime prior to January 1, 2015, Mr. Cross was assigned, and became the  
16 owner of, a cellular telephone number from his wireless provider.  
17 14. On or about October 7, 2016, Mr. Cross received a telephone call on his  
18 cellular telephone from IE, in which IE utilized an automatic telephone  
19 dialing system (“ATDS”) as defined by 47 U.S.C. § 227(a)(1), using an  
20 “artificial or prerecorded voice” as prohibited by 47 U.S.C. § 227(b)(1)(A).  
21 15. The calls to Mr. Cross’s cellular telephone number (San Diego area code  
22 (858) XXX-9812), from IE came from phone number: (323) 557-8956.  
23 16. During this call from IE to Mr. Cross’s cellular telephone, an artificial or  
24 prerecorded voice said, “Hi, this is Amanda. Are you the homeowner?” Mr.  
25 Cross answered, “yes” and then he heard a click as if the call was transferred.  
26 17. Then a new voice came on and said, “Hi, are you interested in saving money  
27 on your electric bill?” This was a live person. Mr. Cross inquired of the  
28 person her name, company, and a call back number.

1 18. The person stated that her name was Riley from Infinity Energy and her call  
2 back number was (888) 244-2513.

3 19. The ATDS used by IE has the capacity to store or produce telephone numbers  
4 to be called, using a random or sequential number generator.

5 20. The ATDS used by IE also has the capacity to, and does, call telephone  
6 numbers from a list of databases of telephone numbers automatically and  
7 without human intervention.

8 21. The telephone number IE called was assigned to a cellular telephone service  
9 for which Plaintiff incurred a charge for incoming calls pursuant to 47 U.S.C.  
10 § 227 (b)(1).

11 22. Plaintiff at no time provided “prior express consent” for IE to place telephone  
12 calls to Plaintiff’s cellular telephone with an artificial or prerecorded voice  
13 utilizing an ATDS as proscribed under 47 U.S.C. § 227(b)(1)(A).

14 23. Plaintiff had not provided his cellular telephone number to IE. Plaintiff was  
15 not a customer of IE. Plaintiff had no “established business relationship” with  
16 defendant, as defined by 47 U.S.C. § 227 (a)(2).

17 24. These telephone calls made by IE or its agents were in violation of 47 U.S.C.  
18 § 227(b)(1).

19  
20 **STANDING**

21 25. Standing is proper under Article III of the Constitution of the United States of  
22 America because Plaintiff’s claims state:  
23 a. a valid injury in fact;  
24 b. which is traceable to the conduct of Defendant;  
25 c. and is likely to be redressed by a favorable judicial decision.

26 See, *Spokeo, Inc. v. Robins*, 578 U.S. \_\_\_\_ (2016) at 6, and *Lujan v.*  
27 *Defenders of Wildlife*, 504 U.S. 555 at 560.

1 26. In order to meet the standard laid out in *Spokeo* and *Lujan*, Plaintiff must  
2 clearly allege facts demonstrating all three prongs above.

3

4 **A. *The “Injury in Fact” Prong***

5 27. Plaintiff’s injury in fact must be both “concrete” and “particularized” in order  
6 to satisfy the requirements of Article III of the Constitution, as laid out in  
7 *Spokeo* (*Id.*).

8 28. For an injury to be “concrete” it must be a *de facto* injury, meaning that it  
9 actually exists. In the present case, Plaintiff was called on his cellular phone  
10 at least ten times by Defendant. Such calls are a nuisance, an invasion of  
11 privacy, and an expense to Plaintiff. *Soppet v. Enhanced Recovery Co., LLC*,  
12 679 F.3d 637, 638 (7<sup>th</sup> Cir. 2012). All three of these injuries are concrete and  
13 *de facto*.

14 29. For an injury to be “particularized” means that the injury must “affect the  
15 plaintiff in a personal and individual way.” *Spokeo, Inc. v. Robins*, 578 U.S.  
16 \_\_\_\_\_ (2016) at 7. In the instant case, it was plaintiff’s phone that was called  
17 and it was plaintiff himself who answered the calls. It was plaintiff’s personal  
18 privacy and peace that was invaded by IE’s persistent phone calls using an  
19 ATDS. Finally, plaintiff alone is responsible to pay the bill on his cellular  
20 phone. All of these injuries are particularized and specific to plaintiff, and  
21 will be the same injuries suffered by each member of the putative class.

22

23 **B. *The “Traceable to the Conduct of Defendant” Prong***

24 30. The second prong required to establish standing at the pleadings phase is that  
25 Plaintiff must allege facts to show that his injury is traceable to the conduct of  
26 Defendant(s).



1       31. In the instant case, this prong is met simply by the fact that the calls to  
2       plaintiff's cellular phone were placed either, by Defendant directly, or by  
3       Defendant's agent at the direction of Defendant.

4

5       **C. *The "Injury is Likely to be Redressed by a Favorable Judicial Opinion" Prong***

6

7       32. The third prong to establish standing at the pleadings phase requires Plaintiff  
8       to allege facts to show that the injury is likely to be redressed by a favorable  
9       judicial opinion.

10       33. In the present case, Plaintiff's Prayers for Relief include a request for  
11       damages for each call made by Defendants, as authorized by statute in 47  
12       U.S.C. § 227. The statutory damages were set by Congress and specifically  
13       redress the financial damages suffered by Plaintiff and the members of the  
14       putative class.

15       34. Furthermore, Plaintiff's Prayers for Relief request injunctive relief to restrain  
16       Defendant from the alleged abusive practices in the future. The award of  
17       monetary damages and the order for injunctive relief redress the injuries of  
18       the past, and prevent further injury in the future.

19       35. Because all standing requirements of Article III of the U.S. Constitution have  
20       been met, as laid out in *Spokeo, Inc. v. Robins*, 578 U.S. \_\_\_\_ (2016), Plaintiff  
21       has standing to sue Defendant on the stated claims.

22

23       **CLASS ACTION ALLEGATIONS**

24       36. Plaintiff brings this action on behalf of himself and on behalf of all others  
25       similarly situated ("the Class").

26       37. Plaintiff represents, and is a member of, the Class, consisting of:  
27           a. All persons within the United States who had or have a number  
28           assigned to a cellular telephone service, who received at least one call

1 using an ATDS and/or an artificial prerecorded voice from Infinity  
2 Energy, Inc., or its agents, calling on behalf of Infinity Energy, Inc.,  
3 between the date of filing this action and the four years preceding,  
4 where such calls were placed for marketing purposes, to non-  
5 customers of Infinity Energy, Inc., at the time of the calls.

6 38. IE and its employees or agents are excluded from the Class. Plaintiff does not  
7 know the number of members in the Class, but believes the Class members  
8 number in the thousands, if not more. Thus, this matter should be certified as  
9 a Class action to assist in the expeditious litigation of this matter.

10 39. Plaintiff and members of the Class were harmed by the acts of Defendant in at  
11 least the following ways: Defendant illegally contacted Plaintiff and the Class  
12 members via their cellular telephones thereby causing Plaintiff and the Class  
13 members to incur certain cellular telephone charges or reduce cellular  
14 telephone time for which Plaintiff and the Class members previously paid, by  
15 having to retrieve or administer messages left by Defendant or their agents,  
16 during those illegal calls, and invading the privacy of said Plaintiff and the  
17 Class members. Plaintiff and the Class members were damaged thereby.

18 40. This suit seeks only damages and injunctive relief for recovery of economic  
19 injury on behalf of the Class and it expressly is not intended to request any  
20 recovery for personal injury and claims related thereto. Plaintiff reserves the  
21 right to expand the Class definition to seek recovery on behalf of additional  
22 persons as warranted as facts are learned in further investigation and  
23 discovery.

24 41. The joinder of the Class members is impractical and the disposition of their  
25 claims in the Class action will provide substantial benefits both to the parties  
26 and to the Court. The Class can be identified through Defendant's records  
27 and/or Defendant's agent's records.

28



1 42. There is a well-defined community of interest in the questions of law and fact  
2 involved affecting the parties to be represented. The questions of law and fact  
3 to the Class predominate over questions which may affect individual Class  
4 members, including the following:

5 i. Whether, within the four years prior to the filing of the  
6 Complaint, IE made any call(s) (other than a call made for  
7 emergency purposes or made with the prior express consent of  
8 the called party) to the Class members using any ATDS or an  
9 artificial or prerecorded voice to any telephone number  
10 assigned to a cellular telephone service;

11 ii. Whether IE called non-customers of IE for marketing purposes;

12 iii. Whether Plaintiff and the Class members were damaged thereby,  
13 and the extent of damages for such violation(s); and

14 iv. Whether IE should be enjoined from engaging in such conduct  
15 in the future.

16 43. As a person that received numerous calls from Defendant in which Defendant  
17 used an ATDS or an artificial or prerecorded voice, without Plaintiff's prior  
18 express consent, Plaintiff is asserting claims that are typical of the Class.  
19 Plaintiff will fairly and adequately represent and protect the interests of the  
20 Class in that Plaintiff has no interests antagonistic to any member of the  
21 Class.

22 44. Plaintiff and the members of the Class have all suffered irreparable harm as a  
23 result of the Defendant's unlawful and wrongful conduct. Absent a class  
24 action, the Class will continue to face the potential for irreparable harm. In  
25 addition, these violations of law will be allowed to proceed without remedy  
26 and Defendant will likely continue such illegal conduct. The size of Class  
27 member's individual claims causes, few, if any, Class members to be able to  
28 afford to seek legal redress for the wrongs complained of herein.

1 45. Plaintiff has retained counsel experienced in handling class action claims and  
2 claims involving violations of the Telephone Consumer Protection Act.

3 46. A class action is a superior method for the fair and efficient adjudication of  
4 this controversy. Class-wide damages are essential to induce Defendant to  
5 comply with federal and California law. The interest of Class members in  
6 individually controlling the prosecution of separate claims against Defendant  
7 is small because the maximum statutory damages in an individual action for  
8 violation of privacy are minimal. Management of these claims is likely to  
9 present significantly fewer difficulties than those that would be presented in  
10 numerous individual claims.

11 47. Defendant has acted on grounds generally applicable to the Class, thereby  
12 making appropriate final injunctive relief and corresponding declaratory relief  
13 with respect to the Class as a whole.

14

15 **FIRST CAUSE OF ACTION:**  
16 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER**  
17 **PROTECTION ACT 47 U.S.C. § 227 ET SEQ.**

18 48. Plaintiff incorporates by reference all of the above paragraphs of this  
19 Complaint as though fully stated herein.

20 49. The foregoing acts and omissions of Defendant constitutes numerous and  
21 multiple negligent violations of the TCPA, including but not limited to each  
22 and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

23 50. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq.,  
24 Plaintiff and the Class are entitled to an award of \$500.00 in statutory  
25 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

26 51. Plaintiff and the Class are also entitled to and seek injunctive relief  
27 prohibiting such conduct in the future.

28 ///



**SECOND CAUSE OF ACTION:  
KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE  
CONSUMER PROTECTION ACT 47 U.S.C. § 227 ET SEQ.**

52. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
53. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.
54. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq., Plaintiff and each of the Class are entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
55. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

## PRAYER FOR RELIEF

56. Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the Class members the following relief against IE:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF  
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

57. As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
58. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
59. Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL  
VIOLATION  
OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

60. As a result of Defendant's willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member treble damages, as provided by statute, up to \$1,500.00 for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
61. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
62. Any other relief the Court may deem just and proper.

## TRIAL BY JURY

63. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Respectfully submitted,

Date: October 7, 2016

## HYDE & SWIGART

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